IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of Decision : December 10, 2007

FAO 193/2006 & CM 10439/2006

INDICON PROJECT & EQUIPMENT LTD. ..... Appellant
Through Mr. Atul Nigam with
Mr. A. Nayak, Advocates.

versus

RATHI ISPAT LTD. ..... Respondent
Through Mr. Shiv Khorana with
Ms. Manpreet Bhalla, Advocates

and

RFA 458/2006 & CM 10106/2006

INDICON PROJECT & EQUIPMENT LTD. ..... Appellant
Through Mr. Atul Nigam with
Mr. A. Nayak, Advocates.

versus

RATHI ISPAT LTD. ..... Respondent
Through Mr. Shiv Khorana with
Ms. Manpreet Bhalla, Advocates

CORAM:
HON'BLE DR. JUSTICE S. MURALIDHAR
HON'BLE MR. JUSTICE SUDERSHAN KUMAR MISRA

1. Whether Reporters of local papers may be allowed to see the judgment? Yes
2. To be referred to the Reporter or not? Yes
3. Whether the judgment should be reported in Digest? Yes

Dr. S. Muralidhar, J. (open court)

1. The defendant in Suit No. 120/04/98 is the Appellant in both these

appeals. In FAO No. 193 of 2006, the challenge is to an Order dated 11.7.2006 passed by the learned Additional District Judge, Delhi (ADJ), dismissing the defendant's application, M-28/05, under Order IX Rule 13 of the Code of Civil Procedure, 1908 (`CPC') seeking the setting aside of *ex parte* decree dated 3.9.2004 passed by the ADJ in the suit.

2. The Respondent plaintiff filed Suit No. 1315 of 1998 in this Court against the Appellant defendant for recovery of Rs. 8,67,074/- which included a sum of Rs. 3,19,188/- being the price of a fourth set of rings which were supplied by the defendant to the plaintiff against certain purchase orders placed with it. The amount claimed included interest, the refund of illegally encashed security and certain other charges. During the period the suit was pending in this Court, pleadings were completed, exhibits were marked and affidavits of evidence were filed by the parties.

3. The record of the case shows that on 13.2.2003, the following order was passed by this Court :

> "13.2.2003
> Present : Mr.Shiv Khurana for the plaintiff.
> Mr.S.C.Nigam for the defendant.

> Since the plaintiff has filed the affidavits of his witnesses in examination-in-chief, let the defendant also file the affidavits of his witnesses in examination-in-chief within six weeks. However the witnesses who are officials and whose affidavits cannot be filed may be summoned by the parties for examination. Mr. Amit Bansal, Advocate, N-8, Greater Kailash-I, New Delhi-110 048 (Tel. No. 26488021, 26488022) as Local Commissioner for recording of examination/cross-examination of witnesses of the parties. His fees is fixed at Rs.500/- per witness payable by the respective party. The Dealing Clerk shall ensure the availability of the file before the Local Commissioner at the time of cross-examination of the witnesses and shall be paid Rs. 250/- for each day on which the file is made available to the Local Commissioner, to be shared by both the parties and both the parties may file list of witnesses within two weeks."

It requires to be noted that while directing examination of the witnesses by a Local Commissioner, this Court did not set down the matter for further hearing on any assigned date.

4. On 19.2.2004 the matter was placed before the Joint Registrar of this Court on the basis of an office note. The Joint Registrar noted that the value of the suit for the purposes of pecuniary jurisdiction was less than Rs. 20 lakhs and that in view of Section 2 of the Delhi High Court (Amendment) Act, 2003 [`Act'], the matter was being transferred to the Court of District

Judge, District Courts, Tis Hazari, Delhi. The Joint Registrar then directed that the parties and/or their counsel to appear before the District Judge, Delhi on 15.4.2004. A perusal of this order indicates that there was no appearance on behalf of either of the parties to the suit. Clearly, the matter was taken up by the Joint Registrar only on the basis of an internal office note prepared on the basis of the change in the pecuniary jurisdiction of this Court brought about by the Act.

5. Thereafter when the suit was renumbered as Suit No. 120/04/98 and listed before the learned ADJ on 15.4.2004 again none appeared for the parties. On the subsequent two dates, i.e., 21.5.2004 and 29.5.2004 none appeared for the parties.

6. On 21.5.2004, when none appeared for the parties, the learned ADJ directed notice to issue to the counsel for the parties for 29.5.2004. The record of the Trial Court indicates that the process server submitted a report to the Court pursuant to the aforementioned order. In his report, the process server stated that on 28.5.2004 he visited the address of Shri S.C. Nigam, Advocate for the Defendant. He asked for Mr. Nigam. There was a lady at the premises who informed the process server that Mr. Nigam was not

available. She did not disclose her identity. The process server had to return without serving the notice.

7. After perusing this report, the learned ADJ on 29.5.2004 passed the following order :

> "29/5/04
>
> Pr : None
>
> Court notice not served. Let Court notice upon counsel for parties be served through affixation for 3/7/04.
>
> Sd/-
>
> ADJ : Delhi

8. Pursuant to the above order, the process server again visited the premises of Mr. S.C. Nigam, Advocate on 17.6.2004. This time again he did not find Mr. Nigam in the premises. He states in his report dated 17.6.2004 that he affixed the notice on the gate of the premises.

9. Thereafter when the matter was listed on 3.7.2004, the learned ADJ noted that counsel for the defendant had been served through affixation. He concluded that "it amounts to due service upon defendant." The record of the proceedings show that on this date of hearing the plaintiff was represented by learned counsel but the defendant was not.

10. At the subsequent hearing, i.e., on 20.8.2004, when none appeared for the defendant, the defendant was proceeded *ex parte*. Thereafter, the matter was set down for evidence of the plaintiff and by a judgment and decree dated 3.9.2004, the suit was decreed in favour of the plaintiff. It may be mentioned here that against the judgment and decree dated 3.9.2004 the defendant appellant has filed the companion appeal RFA No. 458 of 2006 which is being disposed of by this common judgment.

11. According to the defendant it first came to know of the judgment and decree dated 3.9.2004 and the Order dated 20.8.2004 setting the defendant *ex parte* for the first time on 26.7.2005 when an attachment order was received by M/s Punjab and Sind Bank from this Court which was said to be in satisfaction of Execution Petition No. 6 of 2005 titled ***M/s Rathi Ispat Ltd. v. Indicon Project & Equipments Ltd***. It is stated that immediately upon receiving this information, the Director of the Defendant/Appellant, Shri P.N. Mishra contacted his lawyers and thereafter the Court record was inspected from where these details were obtained.

12. The Defendant then filed on the 9th of August 2005 an application being M-28/05 under Order IX Rule 13 CPC seeking setting the aside of the

ex parte judgment and decree passed by the ADJ on 3.9.2004. In support of the application, the defendant filed an affidavit dated 9.8.2005 of Shri S.C. Nigam to the effect that no service of the notice issued by the Court had been effected upon him and that the Report of the process server of having affixed the court notice at his residence was false. An affidavit was also filed of Mr. P.N. Mishra explaining circumstances under which he came to learn of the *ex parte* decree on 26.7.2005.

13. In the impugned order dated 11.7.2006, dismissing the application, the learned ADJ has referred to three specific circumstances which led him to conclude that the application was without merit. First, the learned ADJ concluded that the affixation of the court notice was as per the proper procedure since the report of the process server indicated that "counsel was not available being out of station". The learned ADJ noted from the previous report dated 28.5.2004 of the process server that the lady present at the premises who had stated that Shri Nigam was not available, did not disclose her name, and that, therefore, "this was (sic) amounted to refusal." The Court concluded that the procedure by which affixation was directed and carried out was proper. The second reason that weighed with the Court was that there was no reason to disbelieve the process server's report about

the affixation of the notice. Thirdly, that a notice by speed post was sent on 19.8.2004 by counsel for the plaintiff to both the defendant as well as the counsel for the defendant in support of which a photocopy of the plaintiff's despatch register had also been produced.

14. Learned counsel for the Appellant assails the impugned order of the learned ADJ by contending that the report of the process server in fact nowhere discloses that there was refusal of service by any one in the premises of the counsel for the defendant. He submits that there was no occasion for the Court to direct affixation of the notice at the premises of the counsel for the defendant. He submits that the procedure adopted by the learned Trial Court, after concluding that there was service of notice upon counsel for the defendant, was improper and in the circumstances there was no occasion for the Court to have set the defendant *ex parte*. Although at one stage the learned counsel for the Appellant sought to contend that it was mandatory for the defendant also to be served separately about the date of hearing of the case in the Trial Court, he did not press this point in view of the settled position that service through counsel would tantamount to service on the party. He also did not dispute that Shri Nigam in any event continued to represent the defendant.

15. In reply, learned counsel for the Respondent plaintiff first submitted that the contract between the parties subsisted even as on 19.7.1994. According to him, when the case got transferred from this Court to the District Court as a result of the change in pecuniary jurisdiction brought about by Section 2 of the Act, there was no need in law for a notice to be served either on counsel for the parties or the parties. He placed reliance upon the judgment of the Orissa High Court in ***Kanhu Charan v. Banambar Pradhan AIR 1986 Orissa 213*** in support of this contention. He further submitted that the report of the process server indicated that the person available at the premises of Shri S.C. Nigam did not disclose her identity and although the express wording of the report may not indicate that there was refusal of service, the procedure adopted by the trial court for service through affixation on the basis of such report was proper. He sought to contend that the defendant had deliberately stayed away from the court proceedings and that the learned trial court was fully justified in disbelieving the version of the defendant and in therefore dismissing the application under Order IX Rule 13 CPC.

16. We find from the perusal of the record of the case that in the first place even when the matter was pending in this Court, the order dated

13.2.2003 did not fix the date of further hearing of the case. It is unlikely therefore that the counsel for either of the parties could have anticipated when the matter would be listed next. Secondly, as already noticed, when the order was passed by the Joint Registrar of this Court on 19.2.2004 neither of the parties was present and the matter came to be placed before the Joint Registrar only upon the basis of an office note. It is, therefore, unlikely that the date date assigned by the Joint Registrar, i.e., 15.4.2004 could have been in the knowledge of either of the counsel for the parties, and therefore the parties. This explains how on at least three dates of the hearing thereafter before the Trial Court, none appeared for the parties.

17. We then come to the two reports of the process server. Neither of the reports in our view lead to a conclusion that there was a refusal of service by any one or that the process server had somehow concluded that it was not possible to serve the learned counsel for the defendant through the regular method. There is also nothing to show that counsel for the defendant was avoiding service of notice. The two reports of the process server are not unequivocal on this aspect. We are of the view that only after the Court comes to a definite conclusion that it is not possible to have the notice served on a party through the regular process should it direct service by way

of affixation of notice. In its order dated 29.5.2004 no such conclusion is recorded by the Trial Court. Upon a perusal of the Report dated 17.6.2004 of the process server we are unable to come to a conclusion, in the manner the learned ADJ did, that there was a refusal of service and that service by way of affixation was, therefore, inevitable. It appears to us that having resorted to the procedure of directing service of notice upon counsel for the parties, the Trial Court erred, in the circumstances narrated, in directing affixation of notice. We do believe that the Trial Court should have directed fresh notice to the counsel for the defendant before deciding to set the defendant *ex parte*. Nothing really turned on the notice sent by speed post by the counsel for the plaintiff on 19.8.2004, one day prior to the hearing, to the counsel for the defendant (and not the defendant as wrongly noted by the Trial Court). Also, there is nothing to prove the despatch of such notice by speed post.

18. The decision of the Orissa High Court in ***Kanhu Charan***, cited by the learned counsel for the plaintiff Respondent, turned on its own facts. There cannot be any hard and fast rule that notice has in all circumstances to be issued on both parties as well as counsel. Nevertheless, we cannot be unmindful of the fact that in view of the transfer of cases from this Court to

the subordinate court as a result of the change of the pecuniary jurisdiction, it is possible that the parties may not have known the precise dates when the cases were listed before the Trial Court. Unfortunately the record of the case shows that even counsel for the parties in this Court were not aware of and could not have been aware of the date when the matter was fixed for hearing before the Trial Court. Further, the Trial Court did not in its impugned order explain why it did not find the explanation offered by the defendant for its non-appearance to be acceptable.

19. In the circumstances, it appears to us that the explanation offered by the defendant for its failure to appear before the Trial Court on 3.7.2004 and thereafter on 20.8.2004 is reasonable and merits acceptance. There was sufficient cause shown by the Appellant defendant to persuade the Trial Court to allow the application filed by the Appellant defendant under Order IX Rule 13 CPC.

20. Accordingly, the impugned Order dated 11.7.2006 is set aside. Consequently the application, M-28 of 2005, filed by the defendant under Order IX Rule 13 CPC is allowed. The appeal FAO No. 193 of 2006 is allowed and CM 10439 of 2006 is disposed of.

21. The further consequence is that the ex parte judgment and decree dated 3.9.2004 which was based upon the Order dated 20.8.2004 by which the Trial Court set the defendant *ex parte* cannot be sustained in law and is accordingly hereby set aside. RFA No. 458 of 2006 is accordingly allowed and CM No. 10106 of 2006 is disposed of.

22. The Suit No. 120/04/98 will now get restored to the file of the trial court. The trial court's records will be returned by the Registry of this Court to the Trial Court within two weeks from today. The parties will appear before the Trial Court on 28.1.2008.

23. Pursuant to the Order dated 12.8.2007 passed by this Court, the Appellant had deposited the entire decretal amount in this Court. As a result of the order passed by us today, the amount together any interest accrued thereon will be returned to Appellant by the Registry of this Court within a period of two weeks from today. The Appellant will satisfy the Registrar as to the proper identification of its representative and the payment of the amount will be made in accordance with rules.

24. With the above directions, both appeals stand allowed and the applications stand disposed of accordingly.

S. Muralidhar, J.

Sudershan Kumar Misra, J.

December 10, 2007
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